

Dec 19, 2017

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JESUS TORRES,

Defendant.

No. 4:17-cr-06015-EFS-1

**ORDER DENYING DEFENDANT'S MOTION
TO AMEND/CORRECT JUDGMENT**

Before the Court, without oral argument, is Defendant Jesus Torres' Motion to Amend/Correct Judgment, ECF No. 102. Defendant moves the Court under Federal Rule of Criminal Procedure 35(a) to amend its Judgment sentencing him to 180 months' imprisonment. See ECF No. 98. Defendant bases his motion on a recent decision by the Court of Appeals for the Ninth Circuit, which held that the Washington accomplice liability statute, RCW 9A.08.020(3)(a)(i)-(ii), was more inclusive than its federal generic equivalent. See *United States v. Valdivia-Flores*, No. 15-50384, 2017 WL 6044232, 5 (9th Cir. Dec. 7, 2017). Accordingly, in *Valdivia-Flores*, the petitioner's prior drug trafficking conviction under RCW 69.50.401 could not serve as an aggravated felony for the purposes of the Immigration and Naturalization Act. *Id.* at 6.

1 As the parties are aware, this Court rejected Defendant's
2 argument that a Washington conviction for delivery of a controlled
3 substance – for the same reasons as articulated by the majority of the
4 Ninth Circuit panel – could not constitute a predicate felony for the
5 purposes of a career offender enhancement. See ECF No. 77, 98. The
6 Court was persuaded by the reasoning articulated in *United States v.*
7 *Chavez-Nava*, where the panel rejected an identical argument because
8 the petitioner had “not shown the realistic probability of prosecution
9 as an accomplice with only a knowing *mens rea* under the drug offense
10 statute in Washington.” 649 F. App'x 560, 563 (9th Cir.), cert.
11 denied, 137 S. Ct. 582, 196 L. Ed. 2d 455 (2016) (quoting *United*
12 *States v. Burgos-Ortega*, 777 F.3d 1047, 1055-56 (9th Cir. 2015). A
13 “theoretical possibility” that a defendant could be prosecuted as an
14 accomplice with only a knowing *mens rea* was insufficient. *Id.*

15 As such, the Court determined Defendant was a career offender
16 due to his predicate offenses, which led to a Total Offense Level of
17 31 and a Guideline range of 188 to 235 months. However, the Court
18 recognized the lack of clarity surrounding the issue and made an
19 alternative calculation under the Guidelines. Were the Defendant not a
20 career offender, the Court calculated that the quantity of
21 methamphetamine, dangerous weapon enhancement, and Defendant's
22 criminal history category led to a Total Offense Level of 29 and a
23 Guideline range of 151 to 181 months. In any event, the Court
24 explained that “even if [Defendant] is not a career offender. . . the
25 Court would nonetheless impose the same sentence” of 180 months. ECF
26 No. 99. The Court also notes that Defendant waived his right to appeal

1 his conviction and sentence, so long as the Court imposed a prison
2 term no higher than 180 months. See ECF No. 66 at 13.

3 Federal Rule of Criminal Procedure 35(a) provides that "[w]ithin
4 14 days after sentencing, the court may correct a sentence that
5 resulted from arithmetical, technical, or other clear error." The
6 Court disagrees with the majority's opinion in *Valdivia-Flores* and
7 aligns itself with broader criticism of the categorical approach
8 expressed in Judge O'Scannlain's special concurrence. See 2017 WL
9 604432 at 7-8. Regardless, because the Court made two Guidelines
10 calculations and explained that its sentence would be the same
11 regardless of Defendant's career-offender status, the subsequent
12 publication of the *Valdivia-Flores* decision has no effect on
13 Defendant's sentence. Thus, the Court's sentence of Defendant was not
14 "arithmetical, technical, or other clear error." Fed. R. Crim. P.
15 35(a).

16 Accordingly, **IT IS HEREBY ORDERED:** Defendant's Motion to
17 Amend/Correct Judgment, ECF No. 102, is **DENIED**.

18 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
19 Order and provide copies to all counsel.

20 **DATED** this 19th day of December 2017.

21 _____
22 s/Edward F. Shea
23 EDWARD F. SHEA
24 Senior United States District Judge
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